STATE OF ALASKA DEPARTMENT OF NATURAL RESOURCES
DIVISION OF MINING, LAND AND WATER

Southeast Regional Office

Preliminary Decision

ADL 109009

Bonnie Oaksmith dba Air Marine Harbor

Application for Lease

AS 38.05.075(c)

Executive Summary

This Preliminary Decision (PD) is the State's preliminary best interest finding regarding a proposed disposal of interest in state land. Bonnie Oaksmith dba Air Marine Harbor has applied for a state land lease to use approximately 3.00 acres of state uplands, tidelands, and submerged lands for boat storage and their long-standing marina business. At this time the state intends to authorize this lease, contingent on comments received during public notice and the best interest findings contained herein. The public is invited to comment on this PD. The deadline for commenting is 5:00 pm July 13, 2020. Please see the Public Notice section of this decision for requirements related to submitting comments for consideration. Only the applicant and those who comment have the right to appeal the Final Finding and Decision (FFD).

Requested Action

Air Marine Harbor ("applicant") applied for a lease on September 24, 2019, to authorize their dry dock facility for smaller boats, up to 50 tons or 65 feet long, that allows customers to conduct their own repairs and maintenance in Ketchikan, Alaska.

The lease request is for continued use of an existing system of floating wood docks, buildings, offices, and tideland fill for marina and boat storage use in association with the Air Marine Harbor business operated by the applicant. A development diagram is included as Attachment 1 and more detailed specifications regarding the improvements are included as Attachment 2.

Proposed/Existing Improvements:

- The Lease Tidelands: Building "1", 9447 sq ft, Building "2", 2152 sq ft, new office building, 832 sq ft, shed, 151 sq ft, floating dock "1", 707 sq ft, floating dock "2", 1289 sq ft, marine railway remnants
- Tract A: Floating wood dock, 105' x 10', ~ 990 sq ft
- Tract B: Floating wood dock, ~ 1095 sq ft
- Tract C: Floating wood dock, 45' x 8', ~ 370 sq ft
- Tract D: Tideland fill, 703 cubic yards, asphalt pad, 570 sq ft, portion of pier, 90 sq ft, water tank "1", 3000 gallons, water tank "2", 2500 gallons

The total area requested by the applicant is approximately 3.00 acres, more or less. Final acreage will be determined by an approved survey of the leasehold.

Proposed Action
The Division of Mining, Land & Water (DMLW) proposes to issue a 25-year non-competitive tideland lease to the applicant for operation of their marina and boat yard.

Scope of Decision
The scope of this decision is limited to the determination of whether it is in the State's best interest to issue a 25-year non-competitive tideland lease in Ketchikan, Alaska. The administrative review for this authorization is defined by AS 38.05.035(e)(1)–(2) and is limited to (1) reasonably foreseeable, significant effects of the uses to be authorized; (2) applicable statutes and regulations; (3) facts pertaining to the land or resources; and (4) issues that are material to the determination.

Authority
This lease application is adjudicated pursuant to AS 38.05.035(b)(1) and AS 38.05.035(e) Powers and Duties of the Director, AS 38.05.070 Generally, AS 38.05.075 Leasing Procedures, and AS 38.05.945 Notice. The authority to execute the PD, Final Finding and Decision (FFD), Entry Authorization (EA), and the lease has been delegated to the Regional Managers of the DMLW.

Administrative Record
The administrative record for the proposed action consists of the Constitution of the State of Alaska, the Alaska Land Act as amended, applicable statutes and regulations referenced here-in, the Central Southern Southeast Area Plan, November 2000, (CSSEAP) and other classification references described herein, and the casefile for the application serialized by DNR as ADL 109009. Other associated casefiles include ADL 22260.

Location Information

Geographic Location:
The parcel is located in Refuge Cove, a navigable body of water within the Tongass Narrows. The site is on state tide and submerged land in Ketchikan, Alaska.

Property Description:
The proposed lease is located within Section 33, Township 74 South, Range 90 East, Copper River Meridian and more particularly located seaward and adjacent to parcel 313340036000 recorded in the Ketchikan Recording District. The proposed leasehold contains approximately 3.00 acres more or less.

Other Land Information

Municipality: Ketchikan Gateway Borough
Regional Corporation: Sealaska Corporation
Village Corporation: N/A
Federally Recognized Tribe: Ketchikan Indian Corporation
Approximate Coordinate Location: 55.4040° N, 131.7433° W (WGS 84)

Title
The State of Alaska holds title to lands beneath tidally influenced and navigable waterways within its jurisdiction, including lands underlying the Tongass Narrows and Refuge Cove in the section(s) referenced above, on the basis of the Equal Footing Doctrine, the Submerged Lands Act of 1953 and AS 38.04.062 (Identification of State Submerged Lands).

Adjacent Landowners
All adjacent land belonged to Dan and Alice Brusich. They are now deceased, but they named Bonnie Oaksmith, the applicant in this project, the sole beneficiary of the property left in the Bruisch Trust.

Third Party Interests
The Ketchikan Gateway Borough is a third-party interest. They are aware that the applicant is seeking authorization for this project and will be notified of the decision.

Planning and Classification
State land in the proposed subject area is managed in accordance with policies outlined in the Central Southern Southeast Area Plan, November 2000, (CSSEAP) located within Management Unit K-26.00. The designated land use is Public Facilities-Retain (Pr) and Public Recreation and Tourism-Undeveloped (Ru).

> **Management Intent:**
> Manage lots and tracts consistent with the designation in the plan map for ASLS 79-243. Tracts identified in the ASLS are to be retained as 'common areas' or used as buffers (CSSEAP, p. 3-289).
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> **Designation:**
> Public Facilities-Retain (Pr) - These sites are reserved for a specific infrastructure to serve state interests. These units are classified Reserved Use Land and are not selectable by municipalities under state law (except under AS 38.05.810). Units designated "Public Facilities-retain" will be retained in state ownership, while units designated "Public Facilities-Transfer" may be conveyed to municipalities, but not sold to individuals. (CSSEAP, p. 3-3)
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> Public Recreation and Tourism-Undeveloped (Ru) - This designation applies to those areas that offer or have a high potential for dispersed recreation or tourism and where desirable recreation conditions are scattered or widespread rather than localized. Developed facilities are generally not necessary other than trails, trail signs, primitive campsites, and other minor improvements. Land in this designation may be conveyed to municipalities depending on the unit's management intent and the relative value of the recreation resources for which the unit was designated. These lands cannot be sold to individuals. (CSSEAP, p. 3-4)

Classification:
11 AAC 55.160. Public Recreation Land. Land classified public recreation is land suitable for recreation uses, waysides, parks, campsites, scenic overlooks, hunting, fishing or boating access sites, trail corridors, or greenbelts along bodies of water or roadways. (CSSEAP, p. 4-2)

11 AAC 55.170. Reserved Land Use.

A. Land classified reserved use is land that:
   1) Is reserved for transfer to another governmental or non-governmental agency that is performing a public service;
   2) Is reserved for transfer through land exchanges; or
   3) Has been designated for a public utility.
B. Nothing in this section requires classification of land identified for a future land exchange under AS 38.05.50. (CSSEAP, p. 4-2 & 4-3)

The management intent for this area does not prohibit the use of land for a commercial marina business and dry dock facility. The management plan identifies tracts in the ASLS Managed lots and tracts to be retained as 'common areas' or used as buffers (CSSEAP, p. 3-289), which is not impeded on by this authorization. The land use designation Public Facilities-Retain, reserves land for a specific infrastructure to serve state interests and are not selectable by municipalities. Leasing of this land does not convey this land to the municipality, and it works to serve the best interest of the state based on the reasons found in this decision. The land use designation Public Recreation and Tourism-Undeveloped (Ru) applies to those areas that offer, or have a high potential for, dispersed recreation or tourism and where desirable recreation conditions are scattered or widespread rather than localized. This lease authorization does not add any recreational resources to the state, but it does not inhibit any recreational activities from occurring.

Traditional Use Finding
This finding is not required since the proposed leasehold is located within an organized borough (AS 38.05.830). The Borough will be notified of this Preliminary Decision.

Access
The leased areas sit in the center of Brusich Trust land and can be accessed from all sides by drivable throughways. Air Marine Harbor is accessed by boats that can be parked on its dock system in the lease tidelands and tracts A-C. Boat dry dock access is limited to the boat launch sit on Air Marine Harbor lands and State land in tract D.

Access Along Public Waters:
The site is located in Refuge Cove in Ketchikan, Alaska. Pursuant to AS 38.05.126(a), the public has a constitutional right to free access to, and use of, navigable or public waters of the State of Alaska. Under 11 AAC 51.045 and AS 38.05.127, the DMLW is required to reserve specific public-access easements to and along these waters. Unless comments and other information submitted to the DMLW provide justifiable and convincing evidence to do otherwise, this

disposal of state interest will be subject to a 50-foot public access easement seaward and landward of the line of mean high water on the sections of the authorization that include shoreline.

Public Trust Doctrine
Pursuant to AS 38.05.126, the proposed lease will be subject to the principles of the Public Trust Doctrine; specifically, the right of the public to use navigable waterways and the land beneath them for: navigation, commerce, fishing, hunting, protection of areas for ecological studies, and other purposes. These rights must be protected to the maximum extent practicable while allowing for the development of this project. As such, the DMLW is reserving the right to grant other authorizations to the subject area consistent with the Public Trust Doctrine.

Reservation of Mineral Estate
In accordance with section 6(i) of the Alaska Statehood Act and AS 38.05.125, the state, in this decision, reserves unto itself the mineral estate, including oil and gas, and the rights expressed in the reservation clause of the statute, that being the right to reasonable access to the surface for purposes of exploring for, developing and producing the reserved mineral resources. Exploration and development, if any, which could occur, would be consistent with AS 38.05.130 and other applicable statutes and regulations.

Mineral Orders
The proposed leasehold does not fall within the areas delineated in Administrative Mineral Closing Order (MCO) No.747 (CSSEAP, Appendix B). Neither an MCO nor a leasehold location order is necessary or appropriate for this proposed lease.

Hazardous Materials and Potential Contaminants
Hazardous materials, specifically fuel, motor oil, power generators, human waste, trash, gray water, may be stored within the proposed leasehold. Stipulations will be included in the lease to ensure proper handling and storage. The use and storage of all hazardous substances must be done in accordance with existing federal, state, and local laws. Debris (such as soil) contaminated with used motor oil, solvents, or other chemicals may be classified as a hazardous substance, and must be removed from the leasehold and disposed of in accordance with state and federal law.

Agency Review
An agency review was conducted on November, 14, 2019. The deadline for agency comments was November 29, 2019.

The following agencies were included in the review:

- Alaska Department of Fish & Game (ADF&G) - Wildlife Conservation
- Alaska Department of Fish & Game (ADF&G) - HAB-Habitat Southeast
- Department of Environmental Conservation (DEC) – Commissioners Office

- Department of Environmental Conservation (DEC) – Water Plan Review Section Manager
- DNR DMLW – DNR DMLW DPOR OHA/SHPO
- Transportation & Public Facilities – DES-Design and Engineering Services

Agency Review Comment and Response:

No comments were received during the agency review period.

Background
Air Marine Harbor is a family owned business. Dan and Alice Brusich owned Air Marine Harbor and originally leased the main tideland area from the state on January 7, 1964 (ADL 22260). Dan and Alice Brusich are now deceased and have given their property to a series of trusts and named Bonnie Oaksmith as the sole beneficiary. As Air Marine Harbor grows, there are some additional tracts of state land that need to be added to the original leased tidelands. Air Marine Harbor incorporated in 1996 as Air Marine Company, Inc. but they still do business as Air Marine Harbor.

Discussion
There are five parcels of state land that the applicant has included in this lease; the main and largest parcel is titled "The Lease Tidelands". The lease tidelands have rock fill that is drained by a culvert that carries water to the beach, so there is no standing water. There is also a Main Office Building the has some shop space and is used for covered boat storage, and a hangar with many throughways located within the lease tidelands. The other four parcels are titled "Additional Tidelands Tracts A-D". Tract A and Tract B have a portion of a 10' wide floating dock within them. Tract C has a portion of an 8' floating dock within it. Tract D has part of the boat launch, which is very important, as that is the main function of Air Marine Harbor.

The applicant has no plans for additional improvements on any of the leased state land.

Power is provided by Ketchikan Public Utilities. The office, main building, and hangar are supplied by their own power meters. The docks have 12 electric meters available for rent.

Air Marine Harbor generates little waste. Customers are responsible for their own boat substances. The wastewater from the bathroom in the office building goes into an approved cement holding tank and then into a deep-water outfall that traverses the lease tidelands. The deep-water outfall has been there over for 50 years. The Ketchikan Gateway Borough has informed the applicant that their records show that the deep-water outfall is permitted. The Ketchikan Gateway Borough will be notified of this decision.

As for hazardous substances, Air Marine Harbor uses empty 55-gallon drums as blocking for boats. These drums are completely cleaned of oil residue off site prior to use. The drums are taken to a local steel scrapper when they start to deteriorate. Air Marine Harbor does not accept or store waste oil for customers. Air Marine Harbor has a contingency plan of keeping oil

absorbent pads on site to immediately contain any oil spill and the manager is instructed to call the Coast Guard and DEC immediately.

There is no sale of fuel on site. Stored oil on site is for Air Marine Harbor use only. This includes one 150 gallon diesel tank, and two 500 gallon tanks that hold about 300 gallons of gasoline at a time to fuel Air Marine Harbor's gas operated equipment. DEC inspected this site around 20 years ago and determined there was not enough fuel and oils stored on site to have to comply with DEC state regulations. DEC was notified of this application during Agency Review and will be notified of this decision.

The applicant applied for a 55-year lease. DNR is authorizing a 25-year lease. This term is standard for our office to issue, because it allows for Natural Resource Specialists to revisit the lease of state land more regularly to make sure the integrity of the land is maintained.

An economic interest exists for the state because the realization of this lease and use of the land in Ketchikan would generate money for the state for at least 25 years. It would also provide a useful service to Alaskans. Current Air Marine Harbor clientele include a large portion of the southern southeast Alaska charter, gillnet and troll fleets, as well as some purse seiners and several prominent businesses. Without Air Harbor Marine's services these businesses could be negatively impacted. The local economy benefits from the continued business services provided by Air Marine Harbor, which rely on the use of state land in the lease. Given the minimal impact of this use and the activities compliance with the land management intent of the area plan, the proposed lease is found to be in the best interest of the state.

The lease shall be subject to the standard DMLW Lease Agreement (form 102-111, re-vised May 2001), Special Stipulations and the terms and conditions set forth therein (Attachment 3).

Development Plan
The Development Plan (DP) attached to this decision (Attachment 1) and dated October 22, 2018, is under consideration by the DMLW. Should the proposed lease be granted, it is anticipated that the DP will need to be updated throughout the life of the lease as activities and/or infrastructure are added or subtracted. All updates must be approved, in writing, by the DMLW before any construction, deconstruction, replacement of infrastructure, or change in activity will be authorized. The DMLW reserves the right to require additional agency review and/or public notice for changes that are deemed by the DMLW to be beyond the scope of this decision.

Entry Authorization
Pursuant to AS 38.05.075(f), DNR-DMLW will authorize the applicant entry onto state land through the issuance of an Entry Authorization (EA) to conduct the required survey and appraisal, described below. The proposed EA is for a term of two years and would be issued after the Final Decision becomes effective. Once the conditions of the EA are met, the lease will be issued. The total lease term is inclusive of the term of the EA.

Performance Guaranty
In accordance with AS 38.05.035, AS 38.05.860, and 11 AAC 96.060(a) Performance Guaranty, the applicant will be required to submit performance guaranties for the lease to incentivize performance of the conditions of the lease. This provides a mechanism for the state to ensure that the lessee shares any financial costs associated with noncompliance of the lease agreement for site cleanup, restoration, and any associated costs after termination or expiration of the leases. The following bonds will be required:

> **$69,823.00 Performance Bond**: Performance guaranties provide a means to pay for corrective action if the lessee fails to comply with the lease requirements. In accordance with AS 38.05.035(a)(4), the applicant will be required to submit a performance guaranty. The amount of the performance guaranty is based on the scope and the nature of the activity and the potential cost of restoring the site. Performance guaranties are subject to periodic adjustments during the term of the authorization to address increases or decreases in the costs of rectifying problems and rehabilitating state land due to inflation, changes in the level or nature of development, or other appropriate factors.
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> The amount of the performance guaranty would previously have been $139,645.00. However, the DMLW recently withdrew guidance establishing this figure, and has instead made this figure the maximum bonding amount. Given the security provided by the applicant's state of compliance with previous DMLW authorizations they held, and the permanence of the improvements they have placed on state land, the DMLW has decided that imposing 50% of the maximum bonding amount is appropriate. Therefore, the applicant will be required to submit a performance guaranty in the amount of $69,823.00.

Insurance
Per Condition #24 of the lease document, the applicant shall secure or purchase at its own expense, and maintain in force at all times during the term of this lease, the following policies of insurance to protect both themselves and the State of Alaska (officers, agents and employees):

> **Commercial General Liability Insurance Policy**: The policy shall have minimum coverage limits of no less than $1,000,000 combined single limit per occurrence.
>
> Consistent with AS 38.05.035 (a) to protect the State from liability associated with the use of the site, the applicant shall provide and maintain a comprehensive general liability insurance policy with the State of Alaska named as an additional insured party per the stipulations of the Lease Agreement. The applicant shall secure or purchase at its own expense, and maintain in force at all times during the term of this lease, liability coverage and limits consistent with what is professionally recommended as adequate to protect the applicant and the State, its officers, agents and employees from the liability exposures of ALL the insured's operations on state land. The insurance requirement may be adjusted periodically.

Workers' Compensation Insurance: The applicant shall provide and maintain, for all its employees, Workers' Compensation Insurance as required by AS 23.30.045. Where applicable, coverage must comply with any other statutory obligations, whether Federal (i.e., U.S.L.&H., or, Jones Act) or other state laws in which employees are engaged in work on the leased premises. The insurance policy must contain a waiver of subrogation clause in favor of the State of Alaska.

All insurance policies shall comply with, and be issued by, insurers licensed to transact the business of insurance under Alaska Statute, Title 21. The policy shall be written on an "occurrence" form and shall not be written as a "claims made" form unless specifically reviewed and agreed to by the Division of Risk Management, Department of Administration. The State of Alaska must be named as an additional named insured on the policy with respect to the operations of the applicant on or in conjunction with the leased premises, referred to as ADL 109009.

Survey

In accordance with AS 38.04.045, the applicant must complete an approved Alaska Tideland Survey (ATS)/Alaska State Land Survey (ASLS) that meets the standards of DMLW's Surveys Section prior to lease issuance. The measurements identified in the approved survey will be used to accurately calculate the total acreage. The survey must be performed by a registered Land Surveyor under survey instructions issued by the Surveys Section. The applicant is responsible for the cost of the survey. The applicant shall submit an initial draft of the survey at least one year prior to the expiration of the EA. Within 10 business days of the execution of the EA, the applicant shall contact the DNR survey section at (907) 269-8523 to obtain instructions.

Before any fill is placed on state tidelands, the line of mean high water must be determined by a survey, consistent with 11 AAC 96.040(d). This pre-construction survey must be conducted in accordance with instructions from the DMLW Surveys Section.

Appraisal

In consultation with the DMLW Appraisals Unit and in accordance with AS 38.05.840(a), it was determined that an appraisal is required. The applicant must provide a fair market value appraisal of the proposed leasehold prepared by a licensed appraiser approved by the Appraisals Unit. The cost of the appraisal shall be borne by the Applicant.

Compensation

Annual Land Use Fees

The annual land use fee shall be the minimum lease fee of $3,000.00 as established in 11 AAC 58.410(b) until a fair market value appraisal has been completed. Once the appraisal has been completed and fair market value rent for the subject parcel has been determined, if the amount is less than $3,000 per annum the annual fee shall remain at $3,000 in accordance with 11 AAC 58.410(b). However, if it is determined from the appraisal that the fair market value for the subject parcel is greater than the minimum land use fee, then the annual land use fee will be adjusted to reflect this amount from the

effective date of the lease. Additionally, Air Marine Harbor will be responsible for the payment of any difference from payments made during the term of the Entry Authorization.

Periodic Rate Adjustment
In accordance with AS 38.05.105, the annual land use fee payment will be subject to adjustment at five-year intervals after the issuance of the lease.

Payment for Land Use without Authorization
There were only 3 months between closure of the applicant's permit and the application for this lease. Therefore, there will be no payment for land use without authorization.

Subleases
Subleasing may be permissible through AS 38.05.095, if the proposed lease is approved. All potential subleases must first be approved in writing by the DMLW. The DMLW may conduct further agency review and/or public notice before making a determination on the appropriateness of the proposed sublease. The sublease fee will not be less than 25% of the annual fee paid to the lessee by the sublessee.

Reclamation
In accordance with AS 38.05.090, the leasehold must be restored to a "good and marketable condition" as determined by the DMLW within 120 days after termination of the lease.

Public Notice
Pursuant to AS 38.05.945, this PD will be advertised for a 30-day public comment period**,** starting on June 11, 2020. In addition, the post office(s) located near the proposed leasehold will be requested to post the notice pursuant to AS 38.05.945(b)(3)(C). The notice will also be posted on the State of Alaska Online Public Notice website pursuant to AS 38.05.945(b)(3)(B) located at: https://aws.state.ak.us/OnlinePublicNotices/Default.aspx. In accordance with AS 38.05.946, a municipality or a corporation entitled to receive notice under AS 38.05.945(c) may hold a hearing within 30 days after the receipt of the notice.

Comments
The public is invited to comment on this PD. All comments received during the public comment period will be considered in the FFD. If public comments result in significant changes to the PD, additional public notice may be given. A copy of the FFD, along with instructions on filing an appeal, will be sent to all persons who comment on the PD. To be eligible to appeal, a person affected by the FFD must provide written comments during the public comment period per AS 38.05.035(i).

Written comments about this project must be received in this office no later than 5:00 PM on July 13, 2020 to be considered.

To submit comments please choose one of the following methods:

Mail: Department of Natural Resources
Division of Mining, Land and Water
Southeast Regional Land Office
ATTN: Kaitlyn Raffier
PO Box 111020
Juneau, AK 99811
Email: Kaitlyn.raffier@alaska.gov
Fax: (907) 500-9011

Questions about the lease portion of this project can be directed to *Kaitlyn Raffier* at (907) 465-3524.

Signature page follows:

Adjudicator Recommendation

Based on the information provided by the applicant and other agencies, as well as review of planning documents, statutes, and regulations, I recommend approving a 25-year lease to the applicant authorizing the applicant to use state land to maintain and operate their marina business. I recommend proceeding to public notice for the purpose of providing the members of the public and those entities identified in AS 38.05.945 an opportunity to review and submit comments.

Kaitlyn Raffier, Natural Resources Specialist II — Date: June 11, 2020

Preliminary Decision

It is the determination of the Division of Mining, Land & Water that it may be in the State's best interest to issue a 25-year lease to the applicant, as described above. This preliminary decision shall now proceed to public notice.

Lee V. Cole, Jr., Southeast Regional Manager — Date: June 11, 2020

ATTACHMENTS:

Attachment 1. Development Plan
Attachment 2. Specifications of Improvements
Attachment 3. Standard Lease Agreement and Special Stipulations
Attachment 4. Entry Authorization